

Ultimately, no one attended the NIGA convention on behalf of Havenick, and Fowler did not attend on behalf of the DNC. Part of the reason may lie in a phone call between Berger and Fowler on Aug. 15, 1995. Fowler had called Berger on the morning of Aug. 11, and as of Aug. 14, records show Berger's assistant was still reminding him to call Fowler back. Late on the next afternoon, while Fowler's trustee director assisted him in placing finance calls, DNC notes reflect that Fowler and Berger spoke about "Indians."⁵³⁶ Neither Berger nor Fowler could recall discussing the Hudson matter in that call or at any time, but Berger was careful not to exclude that possibility.

Patrick O'Connor's St. Croix billing records provide one basis to believe that Berger and Fowler did discuss the controversy and the threat of litigation over the application's denial. Those documents reflect that on Aug. 17 Mercer called O'Connor regarding "possible law suit by Wisconsin Tribes that failed to get the race track trust land from Interior against Don Fowler and our clients." The entry clearly indicates that the call originated from Mercer, and nothing in O'Connor's notes or files reflects he had any prior knowledge of this information. Berger was well aware at this time that Havenick was inclined towards litigation, and Berger had reviewed Platt's Aug. 4 letter to Babbitt laying out the basis for such a suit. Berger cannot rule out that he supplied this information to Fowler, and there is no record or indication of the DNC's receiving it from any other source.

An alternate explanation of why Fowler chose not to attend the NIGA conference relates to his review of a memo that Crain drafted around Aug. 9, which described the upcoming

⁵³⁶The trustee director's notes contain this shorthand, and also indicate that Fowler had tried to reach Patrick O'Connor by phone during the same session.